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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of MARK and
CASSANDRA PRESTON.

2d Civil No. B212767
(Super. Ct. No. D293797)
(Ventura County)

MARK PRESTON,

Appellant,

v.

CASSANDRA PRESTON,

Respondent;

VENTURA COUNTY DEPARTMENT
OF CHILD SUPPORT SERVICES,

Intervener and Respondent.

Husband appeals the trial court's post-judgment order denying his request for a modification of child support. He claims there existed a change of circumstances warranting downward modification of child support, and the trial court erred in awarding wife attorney's fees. Child Support Services submitted a letter to

this court indicating that it could discern no issue that would impact the statewide child support program and would not file a brief. We reverse.

FACTS

Mark Preston (husband) and Cassandra Preston (wife) were married on August 25, 1984, and separated on October 1, 2002. A judgment of dissolution was entered on April 6, 2005. They have 4 children, only two of whom are minors.

OSC Heard by Judge John R. Smiley

Judge John R. Smiley presided over a post-judgment hearing on the issues of child and spousal support and attorney's fees.¹ Spousal support is not an issue on appeal. At the time of the order, husband and wife were both age 41. Husband had served on active duty in the Coast Guard for 23 years and was earning a taxable income of \$5,442 per month and non-taxable income of \$2,580 per month. Husband had indicated that he intended to voluntarily leave the Coast Guard and move to Michigan in July 2006, within two months of the hearing. His active pay would terminate in December, leaving him a retirement income of \$2,643 per month.

Wife was self-employed as a personal trainer and the court found that she had a monthly income of \$2,300. She was to have primary physical custody of all three minors. Wife contended that husband's retirement was early and voluntary and sought to have the court impute to him a monthly income of \$8,000. The court viewed husband's early retirement with disapproval, in light of his youth, high earning capacity and obligation to support his family. The court indicated that husband had skills and abilities which would make him employable in civilian life.

Due to the uncertainty of husband's income and residence, the court calculated child support for three separate time periods: (1) both parties living in California (wife's physical custody of 3 minor children); (2) husband in Michigan, continuing to receive full military pay (wife's physical custody of 2 minors, one having

¹ Pursuant to a copy of a settlement agreement included in wife's brief, the parties agreed that husband would pay monthly spousal support of \$500 until her remarriage, death, or further order of the court.

become an adult); and (3) husband in Michigan, without military pay (wife's physical custody of 2 minors). Husband was ordered to pay monthly child support of \$1,539, which was to increase to \$1,768 on July 1, 2006. In the event that he retired and relocated outside California, child support would be reduced to \$1,667 per month.

The court added: "Given that the court cannot foresee what the future may bring for Husband if and as he transitions to civilian life or if he remains in the military and is assigned elsewhere, the court *quite arbitrarily* assigns taxable income to him of \$6,000 effective November 1, 2006, and invites either party to bring a motion at an appropriate time in order to adjust support accordingly based upon the actual facts of Husband's income at that time." (Italics added.) The court reserved jurisdiction over the issue of spousal support, which was to continue at \$500 per month, and awarded the wife attorney's fees of \$2,500.

OSC Heard by Commissioner Ellen Conroy

On January 16, 2007, several weeks after husband stopped receiving active duty pay, he filed an OSC for modification of child support, spousal support and attorney's fees. The matter was heard before Commissioner Ellen Conroy. She determined that, under the terms of Judge Smiley's order, husband was entitled to bring an OSC to show a change in income earned, but not to recalculate the imputation of earnings. Commissioner Conroy rejected husband's argument that wife's increased income of \$268 per month was a material change of circumstance. She denied his OSC and ordered husband to pay wife \$1,500 in attorney's fees.

OSC Heard by Commissioner Kevin G. DeNoce

Husband filed a third OSC on October 9, 2007, after one of his two minor children moved to Michigan to live with him. Husband's OSC is not included in the record, nor is there a minute order or transcript of this hearing. Apparently, husband alleged changed circumstances because (1) he had obtained primary physical custody of one minor and (2) wife's income had increased significantly. The record does not contain a responsive declaration filed by wife.

The court requested additional briefing. It appears that both parties submitted written responses, but husband's letter is not included in the record. Wife's counsel submitted a letter (dated January 11, 2008) acknowledging that wife had recently overstated her income on a loan application by reporting gross earnings of \$9,500 per month. Counsel suggested that child support be reduced to \$702 per month (from \$1,667), retroactive to October 9, 2007.

Wife's counsel indicated in his letter that wife's gross monthly income had increased to \$7,000 per month for the first three months of 2007, but had since decreased to \$4,304. He referred the court to wife's Income and Expense declaration, filed November 28, 2007. Wife's counsel did not, however, attach that Income and Expense declaration to his letter, nor is it included in the record on appeal. We have before us only two Income and Expense declarations for wife: one document dated February 17, 2006 (received by the court, but not filed), and another dated March 28, 2006 (filed April 4, 2006). They reflect a gross monthly income of \$1,699 in February and gross income of \$1,950 in March.

Commissioner DeNoce adopted the recommendation of wife's counsel. In a written ruling, filed January 23, 2008, he reduced child support to \$702 per month, effective October 9, 2007. He ordered that spousal support remain unchanged and did not award attorney's fees.

OSC Heard By Commissioner Roger L. Lund

On July 7, 2008, husband filed an OSC for modification of child support, spousal support and attorney's fees, which was denied by Commissioner Lund. It is the denial of this OSC which is the subject of the appeal. Husband requested the court to "correct the clerical error of Judge Smiley as to the computation of support" He asserted that he held insurance licenses in two states and his gross earnings for 2008 were \$1,425 per month. Husband indicated that he lived in a depressed area (Michigan), selling insurance and alleged that wife had a net monthly income that exceeded \$5,000.

Wife filed a responsive declaration on August 21, 2008, alleging that her monthly income was \$2,261 as reflected in her November 28, 2007, Income and Expense declaration. However, there was no Income and Expense declaration attached to her responsive declaration.

At the hearing, husband argued that wife had failed to disclose her current income, and that child support should be recalculated considering this factor. Wife's counsel argued that there were no changed circumstances since Commissioner DeNoce issued his order in January 2008. Commissioner Lund took the matter under submission and issued a written ruling on September 5.

Commissioner Lund denied husband's requests, finding that there was no change in circumstances warranting a modification. He noted that "previous judicial officers have on numerous occasions denied [husband's] similar requests for reconsideration or 'correction' of Judge Smiley's allegedly erroneous May 6, 2006 order." Commissioner Lund stated that husband's challenge to Judge Smiley's order should have been made in 2006, by appeal or motion for reconsideration. Wife was awarded \$3,500 in attorney's fees.

Motion for Reconsideration Heard by Commissioner Roger L. Lund

On September 15, 2008, husband, in pro. per., filed a motion for reconsideration. He requested the court to reconsider the matter and "forward" it to Judge Smiley. Husband indicated that circumstances had changed because one of his minor sons had come to live with him in August 2007; wife's income had increased; he had retired and moved to Michigan; had begun a second career; and had been diagnosed as 40 percent disabled by the Veteran's Administration.

At the hearing on the motion, husband challenged Commissioner Lund's denial of his OSC and his award of attorney's fees to wife. Husband reiterated that circumstances had changed because he now had a minor child living with him. Commissioner Lund responded, "That is not the change in circumstances that is dealt with under the law here. Is there a change in income? No. A change in her income? No." Husband responded, "Yes, there is [a change in wife's income], your honor."

Commissioner Lund asked, "There is a change?" Without waiting for a response from husband, he asked both wife's attorney and counsel for Child Support Services whether they wished to add anything, and both replied that they did not. Husband then raised the issue of attorney's fees and Commissioner Lund inquired whether an Income and Expense declaration had been filed. Wife's counsel indicated wife had filed a declaration in late November 2007 and husband's most recent declaration had been filed in July 2008.²

Commissioner Lund concluded that the Income and Expense declarations filed by both parties were "fairly recent" and "adequately give[] me a picture of what you both earn and what your expenses are about. I base that decision on those income and expense declarations. In addition to that, you provided a number of documents that also allowed me to consider what some of your income and expenses are, particularly hers. So I determined based on those filings that the attorney's fees should be owed. You are not getting your way and this is the end of it. Rather than complaining about losing your home, rather than complaining about the same thing that you've been complaining about for three years or so, you ought to start using that money, not for filing fees or for coming out here [from Michigan], but for paying your obligations." The motion was denied.

DISCUSSION

Courts will generally not revise a child support order unless there has been a material change of circumstances at the time the modification is sought. (*In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1234; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 298-299.) The statewide uniform guidelines govern the calculation of child support and seek to place the interest of children as the state's top

² As we have stated, the record on appeal does not include a copy of wife's November 28, 2007, Income and Expense declaration. The record contains only two of wife's Income and Expense declarations, both dated early 2006.

priority. (Fam. Code, §§ 4052, 4053, subd. (e).)³ There is a rebuttable presumption that the guideline formula is correct. (§ 4057, subd. (b)) If the court wishes to depart from the guideline, it may do so only if it makes findings as outlined in section 4056.

The parties cannot simply rely on a computer program to determine the appropriate amount of child support. (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 298.) Rather, the determinations necessary to support a modification must be made by a judge, considering and weighing the appropriate statutory factors. (*Ibid.*) As long as the guidelines are met, the question of whether circumstances have changed sufficiently to warrant a modification is made on a case-by-case basis. (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 556.) In applying the guideline formula, the court may substitute the earning capacity of a parent for actual income as long as it is consistent with the best interest of the children. (§ 4058, subd. (b); *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1336-1337.) We review the trial court's determination for an abuse of discretion. (*In re Marriage of Williams*, *supra*, 150 Cal.App.4th at p. 1234.)

To summarize the pertinent facts, the record on appeal contains two of wife's Income and Expense declarations, both in early 2006, reflecting a gross monthly income of under \$2,000. In January 2008, wife's counsel stated in a letter to the court that wife had gross monthly earnings of \$7,000 for the first quarter of 2007, but her income had decreased to a monthly gross of \$4,304. In August 2008, wife stated in her responsive declaration that she had a net monthly income of \$2,261. On both occasions, wife and her counsel referred the court to wife's November 28, 2007, Income and Expense declaration as evidence of her income. As noted, that document is not in the record.

It is undisputed that wife earned a gross monthly income of \$7,000 for the first three months of 2007. The contested issue was whether wife's income had dropped to \$2,261, as alleged by her counsel, or she continued to earn a monthly gross

³ All further statutory references are to the Family Code.

of \$7,000, as husband claimed. Commissioner Lund did not address the issue of wife's income at the hearing on the OSC, but merely denied husband's motion because Commissioner DeNoce had already reduced child support.

At the hearing on husband's motion for reconsideration in October 2008 Commissioner Lund first inquired whether the parties had filed Income and Expense declarations. He then indicated that his decision to deny husband's OSC was based on the parties' "fairly recent" Income and Expense declarations and other unidentified financial records. Although Commissioner Lund stated that these documents supported his award of attorney's fees to wife, he did not consider the effect of wife's income on the issue of child support. From this record, it is evident that Commissioner Lund neither resolved contested issues nor considered the parties' current circumstances. (§§ 4053, 4057; see Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 17:25.5.) This was an abuse of discretion.

The matter must be remanded to afford husband a judicial determination as to guideline child support, based on both parties' current incomes and the trial court's consideration of the parties' current circumstances. In considering these matters, the court may exercise its broad discretion to impute income to husband.

Attorney's Fees

In a dissolution action, in order to ensure that both parties have access to legal representation, the court may order one party to pay the other's attorney's fees. (§ 2030.) The award of fees is determined by the incomes and needs of the parties and must be just and reasonable under their relative circumstances. (§ 2032, subd. (a).) We review a trial court's award of fees for an abuse of discretion. (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630.) We will not overturn the trial court's order unless "considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citation.]" (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296.) The trial court's failure to consider the statutory factors in awarding fees to wife was an abuse of discretion. (See *In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 318.)

DISPOSITION

We reverse the September 5, 2008, order denying husband's OSC, the order denying reconsideration, and the award of \$3,500 in attorney's fees. The matter is remanded for a guideline formula calculation of child support pursuant to section 4055, using current financial documentation. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

I concur:

GILBERT, P.J.

Yegan, J. Dissenting

In May 2006, the trial court ruled that if husband took an early retirement, husband's imputed income would be \$6,000 a month to reflect the level of military pay he was receiving before the retirement. Husband did not appeal the order and, since then, four judges/commissioners have upheld the child support order based on husband's failure to show a material change in circumstances, a necessary predicate for modification. (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 556.)

Husband's latest motion for reconsideration seeks reconsideration of an Order to Show Cause to correct a "clerical error" by Judge Smiley in 2006. At the October 2008 hearing on the motion for reconsideration, the trial court stated: "I've carefully looked at both what you filed in the past and what my notes were from the hearing and what you filed now. And it is my opinion that there is nothing new that you presented in this motion today There is nothing that is different."

The trial court explained that the 2006 order imputing income was to reflect "the income you could earn with the military. *That was very clear, and now you keep coming back and you keep asking for reconsideration of that* or that that was somehow an error. I've looked at this. The previous judge that sat in this seat looked at this. Everybody that I know of that has looked at this comes to the same conclusion which is to deny your request for reconsideration" (Emphasis added.)

The majority take issue with the 2006 order because, in 2006, the trial court acknowledged that it could not "foresee what the future may bring for Husband if and as he transitions to civilian life or if he remains in the military" But there was nothing unusual about the order. Where an income-earning spouse voluntarily takes an early retirement, earning capacity is generally calculated at the level of pay he or she was earning before retirement. (See e.g., *In re Marriage of Llas* (1993) 12 Cal.App.4th 1630, 1637-1639.) The 2006 order provided

that "either party [may] bring a motion at an appropriate time in order to adjust support accordingly *based upon the actual facts of Husband's income* at that time."

Husband filed four separate OSCs/motions to modify child support, none of which were supported by evidence of a material change of circumstances. In the words of the trial court, "you keep fighting the old order"

The majority fault the trial court for not resolving "contested issues" or considering the parties' current circumstances but that is not a proper subject for a motion for reconsideration. (Maj.Op. p.6.) Section 1008 of the Code of Civil Procedure forbids trial courts from reconsidering orders previously rendered absent new evidence and a satisfactory explanation as to why the moving party did not produce the evidence at an earlier time. (*Lucas v Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027-1028; *In re Marriage of Okum* (1987) 195 Cal.App.3d 176, 184.)

The order denying husband's motion for reconsideration and order awarding wife attorney fees should be affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

John R. Smiley, Judge
Commissioner Ellen Conroy
Commissioner Kevin G. DeNoce
Commissioner Roger L. Lund

Superior Court County of Ventura

Law Offices of Harvey L. Katzman and Harvey L. Katzman for
Appellant Mark Preston.

Lascher & Lascher, Wendy Cole Lascher, Aris E. Karakalos for
Respondent Cassandra Preston.

No appearance for Intervener and Respondent Ventura County
Department of Child Support Services.